

**A Tan Kim Leng & Sons Holdings Sdn Bhd v HSBC (M)
Trustee Bhd & Anor**

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS
NO S4-24-2302 OF 2007
TENGGU MAIMUN J
22 MAY 2008

C *Trusts and Trustees — Breach of trust — Wilful neglect of property — Whether*
trustee acted in breach of trust in leasing out trust property to company controlled
by protector of trust — Whether trustee attempted to obtain best possible deal —
D *Whether lease ought to have been first offered to beneficiaries — Whether absence*
of valuation report of trust property showed willful default or willful neglect on
part of trustee — Whether trustee acted reasonably in leasing out trust property
— Whether trustee had in willful default of terms of trust given preferential
treatment to protectors without proper authorisation

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By a trust deed, the settlor Tan Cheong Leong had transferred a property known as Wisma TCL ('trust property') to the first defendant to be held on trust. There were 16 beneficiaries and five protectors under the trust deed.

F The plaintiff's complaint of breach of trust against the first defendant arose from the fact that the trust property was leased out to the second defendant. The majority shareholder of the second defendant was one of the protectors of the trust deed. As such, the plaintiff sought, inter alia, a declaration that the defendant had acted in breach of trust in granting the lease of the trust property to the second defendant. The plaintiff claimed that the first defendant had in willful default of the terms of the trust given preferential treatment to the protectors without proper authorisation and had acted in breach of their duties under the trust deed. It was also alleged that the first defendant had failed to conduct a market valuation of the trust property before it was leased out. The first defendant claimed it had unsuccessfully advertised the trust property for rent a few times, appointed a property manager to look for tenants and made an offer to all the beneficiaries to lease the trust property. Only then had the first defendant made an offer to lease the trust property to the protectors. The first defendant also claimed that it had to look for a lessee urgently due to the declining occupancy rate of the trust property of almost 50%; the declining balance in the trust fund; the cost that would have been spent maintaining the trust property and other costs involved.

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Held, dismissing the originating summons with costs:

- (1) The plaintiff had not alleged that the first defendant had committed fraud on the beneficiaries. The complaint of breach of trust arose from the fact that the first defendant had not given the option to the beneficiaries as per the terms that was offered to the protector. Clause 6 of the trust deed provided that the trustee shall not be liable for any breach of trust howsoever occurring except to the extent (if any) that such breach results from its own willful default or willful neglect. The first defendant had made attempts to obtain the best possible deal for the trust property. All along the plaintiff knew of the fact that the trust property was up for lease and if the plaintiff had been serious in taking the offer or in making a counter offer, it could have done so by giving its response to the first defendant, but it did not. There was an urgent need to lease out the property as the tenancy agreements had expired and the trust funds were insufficient to refurbish the trust property (see para 18).
- (2) The absence of a valuation report was not fatal and did not in itself show willful default or willful neglect of the first defendant. This is because the lease to the second defendant for the sum of RM42,000 per month for the first five years and RM50,000 per month for the remaining five years was after several advertisements for a higher rate failed to attract any takers (see para 19).
- (3) In the light of the protectors meetings and the decisions that were taken therein, the absence of the written notice did not invalidate the decision to lease out the trust property to the second defendant. The first defendant had acted reasonably and was not in breach of trust in leasing out the trust property to the second defendant (see para 22).

[Bahasa Malaysia summary]

Melalui suatu surat ikatan amanah, Tan Cheong Leong, penyeselai, telah memindahkan suatu hartanah yang dikenali sebagai Wisma TLC ('hartanah amanah') kepada defendan pertama untuk dipegang sebagai amanah. Terdapat 16 benefisiari dan lima penaung di bawah surat ikatan amanah tersebut. Dakwaan plaintif tentang pecah amanah terhadap defendan pertama berbangkit daripada fakta bahawa hartanah amanah itu dipajak kepada defendan kedua. Pemegang saham majoriti defendan kedua merupakan salah seorang penaung surat ikatan amanah tersebut. Maka, plaintif memohon, antara lain, suatu perisytiharan bahawa defendan telah pecah amanah apabila memajak hartanah amanah tersebut kepada defendan kedua. Plaintif mendakwa bahawa defendan pertama secara sengaja memungkiri terma-terma amanah tersebut dengan memberi layanan utama kepada penaung-penaung tanpa mendapat kebenaran yang sepatutnya dan

- A telah melanggar tanggungjawabnya di bawah surat ikatan amanah tersebut. Juga dikatakan bahawa defendan pertama gagal melakukan penilaian harga pasaran hartanah amanah tersebut sebelum dipajakkan. Defendan pertama menghujah bahawa iklan untuk menyewakan hartanah amanah tersebut telah gagal beberapa kali dan dia kemudiannya melantik seorang pengurus
- B hartanah untuk mencari penyewa dan telah menawarkan kepada kesemua benefisiari untuk dipajakkan hartanah tersebut. Hanya selepas itulah defendan pertama menawarkan untuk memajak hartanah amanah itu kepada penaung-penaung. Defendan pertama juga menyatakan bahawa ia perlu mencari pemajak dengan segera disebabkan oleh penurunan kadar
- C pemastautinan hartanah tersebut yang hampir 50%; penyusutan baki dalam tabung amanah tersebut; kos yang perlu ditanggung untuk memelihara hartanah tersebut dan juga lain-lain kos yang berkaitan.
- D **Diputuskan**, menolak saman semula dengan kos:
- (1) Plaintiff tidak mendakwa defendan pertama melakukan fraud terhadap benefisiari-benefisiari. Dakwaan pecah amanah berbangkit daripada fakta bahawa defendan pertama tidak memberi pilihan kepada
- E benefisiari-benefisiari seperti terma-terma yang ditawarkan kepada penaung. Klausula 6 surat ikatan amanah tersebut memperuntukkan bahawa pemegang amanah tidak harus dipertanggungjawabkan terhadap sebarang pecah amanah walau bagaimanapun berlaku, kecuali setakat (jika ada) pecah amanah itu berlaku daripada kemungkiran
- F dengan sengaja atau kecuaiian dengan sengaja. Defendan pertama telah mencuba beberapa kali untuk mendapatkan tawaran yang paling baik untuk hartanah amanah tersebut. Pada setiap masa, plaintiff maklum bahawa hartanah amanah tersebut ditawarkan untuk dipajak dan jika plaintiff serius ingin menerima tawaran tersebut atau membuat tawaran
- G balas, plaintiff tentunya akan memberi jawapan kepada defendan pertama, tetapi plaintiff tidak melakukan sedemikian. Keadaan mendesak untuk hartanah amanah tersebut dipajakkan kerana perjanjian sewaan telah tamat dan tabung amanah tidak mencukupi untuk memulihara hartanah amanah tersebut (lihat perenggan 18).
- H (2) Ketiadaan laporan penilaian tidaklah begitu penting dan tidak menunjukkan kemungkiran dengan sengaja atau kecuaiian dengan sengaja di pihak defendan pertama. Ini disebabkan oleh sewaan kepada defendan kedua pada kadar RM42,000 sebulan bagi lima tahun
- I pertama dan RM50,000 sebulan bagi lima bulan berikutnya merupakan kadar yang diberikan setelah kadar yang lebih tinggi diiklankan gagal menarik minat bakal penyewa (lihat perenggan 19).
- (3) Berikutan dengan mesyuarat penaung-penaung dan keputusan yang telah dibuat, ketiadaan notis bertulis tidak membatalkan keputusan

untuk memajakkan hartanah amanah tersebut kepada defendan kedua. Defendan pertama telah bertindak sewajarnya dan tidak pecah amanah apabila memajakkan hartanah amanah tersebut kepada defendan kedua (lihat perenggan 22).]

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For a case on wilful neglect of property, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2235.

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417, CA (refd)

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Krishnadas all Achutan Nair & Ors v Maniyam all Samykano [1997] 1 MLJ 94; [1997] 1 CLJ 636, FC (refd)

Malayan Banking Berhad v PK Rajamani & Anor [2004] 3 MLJ 28; [2004] 4 AMR 115, CA (refd)

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Subramaniam all NS Dhurai v Sandrakasan all Retnasamy & Ors [2005] 6 MLJ 120; [2005] 5 AMR 292, CA (refd)

Tan Hock Khoon v Phua Siew Lang (P) & Ors [2006] 6 MLJ 645, CA (refd)

Legislation referred to

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National Land Code s 340, 340(4)(b)
Trustees Act 1949

WV Lye (HL Yap with him) (Lye & Yap) for the plaintiff.
Vinayaga (DW Choo with him) (Skrine) for the first defendant.
Joseph Yeo (Joseph Yeo) for the second defendant.

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Tengku Maimun J:

[1] Vide the originating summons the plaintiff is seeking the following reliefs against the defendants:

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(a) a declaration that the defendant had acted in breach of trust of the trust deed dated 8 March 1994 in the administration of the trust property known as Wisma TCL of No 470 Jalan Ipoh, 51200 Kuala Lumpur ('the trust property');

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(b) a declaration that the defendant had acted in breach of trust in granting the lease of the trust property to one Eight Destiny Sdn Bhd who is owned by one of the protectors of the trust;

(c) a declaration that the lease of the trust property given to one Eight Destiny Sdn Bhd was improperly given and invalid;

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(d) an injunction be issued to compel the defendant, whether by themselves, their directors, their officers, their servants, agents,

- A** employees or representatives to disclose and produce all correspondence and/or documents and/or minutes of meeting relating to an en bloc lease and subsequent granting of the lease of the trust property and the terms thereof which are in the defendant's possession custody and/or power;
- B** (e) damages to be assessed;
- (f) costs of this application be borne by the defendant; and
- (g) any other order or direction or relief that this honourable court may think just and proper.
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- [2] The originating summons is premised on the following grounds:
- (a) the first defendant had granted a lease to one Eight Destiny Sdn Bhd of the whole of the trust property;
- D** (b) the majority shareholder of the Eight Destiny Sdn Bhd is one Tan Kim San, one of the protectors of the trust deed and Tan Kim San and the majority of the shareholders of Eight Destiny Sdn Bhd are also shareholders of Tan Kim San & Sons Sdn Bhd, a beneficiary under the trust deed;
- E** (c) no offer was made to the plaintiff of the intended lease of the trust property nor were the terms of the lease to Eight Destiny Sdn Bhd notified to enable the plaintiff to consider if they wanted to make an offer to lease the trust property;
- F** (d) The monthly lease of RM42,000 is below that of the market rate of the area;
- (e) the first defendant is in breach of trust in giving preference to one beneficiary over the others; and
- G** (f) the plaintiff had requested the correspondence and/or documents and/or any minutes of meetings relating to the lease and subsequent granting of the lease of the trust property and the terms thereof, and a copy of the lease. However the defendant had refused and/or failed to provide the plaintiff with copies of the documents requested although the plaintiff, as beneficiary, is entitled to the same (the plaintiff has since abandoned prayer (d) of the originating summons).
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I [3] On 12 December 2007 Eight Destiny Sdn Bhd was allowed to intervene and has since been made the second defendant.

[4] By a deed of settlement dated 8 March 1994 ('the trust deed') entered into between Tan Cheong Leong ('settlor') and the first defendant, the settlor transferred the trust property to the first defendant to be held on trust. There

are 16 beneficiaries and five protectors under the trust deed. The plaintiff's complaint of breach of trust against the first defendant arises from the fact that the trust property was leased out to the second defendant. The majority shareholder of the second defendant is Tan Kim San, one of the protectors of the trust deed. Tan Kim San is also the majority shareholder of Tan Kim San & Sons Sdn Bhd, a beneficiary under the trust deed.

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[5] The background facts leading to the lease are as follows. At the protectors meeting on 13 September 2005, the protectors agreed that the trust property (with the exception of the mezzanine floor which is being used as the memorial hall for the late Tan Cheong Leong and the basement area) be leased en bloc. It was agreed at the meeting that the lease will be advertised in *The STAR* and *Sin Chew Jit Poh* newspapers for three days. At the protectors meeting on 12 October 2005 the first defendant informed the protectors that they have received three letters from interested parties wanting to lease the trust property and that the first defendant will forward the terms and conditions to all the interested parties once the terms and conditions are finalised.

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[6] On the next protectors meeting held on 19 October 2005 the main terms and conditions of the lease were decided and the three interested parties were given a week to reply to the first defendant. On 18 January 2006 the first defendant briefed the protectors meeting that even though second advertisements were placed, there were only three calls and none were interested to take up the building. The first defendant had also informed the protectors meeting that they will have to look for a lessee urgently as the majority of the tenancy agreements had expired and now running on a monthly basis.

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[7] On 14 March 2006 a protectors meeting was held whereby the first defendant highlighted to the protectors the urgency of confirming on the appointment of a lessee for the trust property. The first defendant also informed the meeting that they have made an offer to all the beneficiaries to take up the role of anchor tenant/lessee but the first defendant had not received any response. In this meeting the protectors had shown an interest to lease the building and new terms and conditions were forwarded for their consideration. At the next protectors meeting on 24 August 2006 it was decided that the trust building be leased out to the second defendant.

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[8] It is the case for the plaintiff that there is no proper notice by the protectors pursuant to cl 11(g) to the trustee to allow them the first option to lease the property; that the decision of the trustee to allow them the first option, is made ultra vires the trust deed; that the first defendant has failed to show that they are properly authorised by all the protectors to give the

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A protectors the first option of taking up the lease on new terms and conditions. Therefore the plaintiff contends that the first defendant had on their own volition, in willful default of the terms of the trust given preferential treatment to the protectors without proper authorisation and had acted in breach of their duties under the trust deed.

B [9] Learned counsel for the plaintiff argued that the first defendant was not acting under a mere error of judgment but that the first defendant was acting unreasonably and in willful default and/or willful neglect. This is because the first defendant had failed to conduct a market valuation of the trust property before it was leased out. It was also the argument of the plaintiff that the preferential treatment given to one beneficiary over the other beneficiaries resulted in a breach of trust.

C [10] Learned counsel for the plaintiff further argued that the trust deed is governed by the Trustees Act 1949 and the powers of the trustee are therefore subject to the said Act. Since the lease was unlawfully acquired by the second defendant in the first defendant's purported exercise of a power or authority conferred by the Act, learned counsel for the plaintiff submitted that the court is empowered to set aside the lease. In this regard learned counsel for the plaintiff refers to the case of *Malayan Banking Berhad v PK Rajamani & Anor* [2004] 3 MLJ 28; [2004] 4 AMR 115. Learned counsel also refers to s 340(4)(b) of the National Land Code which provides, inter alia:

F (4) Nothing in this section shall prejudice or prevent —

(a) ...

(b) the determination of any title or interest by operation of law.

G [11] The case of *Krishnadas all Achutan Nair & Ors v Maniyam all Samykan* [1997] 1 MLJ 94; [1997] 1 CLJ 636 was referred to. In the instant case it was the contention of the plaintiff that s 340(4)(b) is applicable to grant relief to the plaintiff where the first defendant had breached its contractual or conscientious obligations to the plaintiff under the trust.

H [12] For the first defendant it was submitted that the trustees are not required to obtain the consent of every beneficiary in order to lease out the trust property. Further it was submitted by learned counsel for the first defendant that it is not fatal and does not amount to a breach of trust if a trustee does not consult the beneficiaries. For the first defendant it was also submitted that the trustee would not be liable for mere errors of judgment so long as the trustee had acted bona fide, reasonably, prudently, fairly and honestly to benefit the beneficiaries. Learned counsel referred to several cases

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and submitted that the first defendant did not breach the deed of settlement as it had taken all reasonable steps ie advertising the trust property for rent a few times; appointed the property manager to look for tenants; made an offer to all the beneficiaries to lease the trust property; thereafter make an offer to lease the trust property to the protectors. Furthermore the first defendant had to address the issues of the declining occupancy rate of almost 50%; the declining balance in the trust fund; the cost that would have been spent maintaining the trust property and other costs involved.

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[13] Learned counsel for the first defendant submitted that the interpretation by the plaintiff of cl 11(g) was out of context and that there is a difference of a notice, act or deed done by the protectors and those done by the first defendant as a trustee. The words 'shall be evidenced in writing' in cl 11(g), contends learned counsel refers to the minutes of the protectors meeting which are all evidenced in writing. The plaintiff's submission that the first defendant had given preferential treatment cannot be right as the trust property was advertised in the newspapers first.

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[14] Lastly it was submitted by the first defendant that the plaintiff had come to court with unclean hands and that the originating summons is a nullity as the facts are substantially in dispute.

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[15] For the second defendant it was submitted that pursuant to the lease agreement entered into between the second defendant and the first defendant, the second defendant is the registered lessee of the trust property. That being the case, learned counsel for the second defendant submitted that the registered interest of the second defendant is indefeasible under s 340 of the National Land Code except in the circumstances set out therein. The plaintiff, contends learned counsel have failed to bring its case within one of the exceptions in order to have the lease granted by the first defendant set aside. The plaintiff had not alleged fraud and the claim of conflict of interest, failure to offer the lease to other beneficiaries, failure to disclose terms of the lease, the preference of one beneficiary over the another and a lease below the market rate, argued learned counsel for the second defendant is not fraud. The case of *Subramaniam all NS Dhurai v Sandrakasan all Retnasamy & Ors* [2005] 6 MLJ 120; [2005] 5 AMR 292 was cited in support thereof.

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[16] It was further submitted by learned counsel for the second defendant that if at all there was a breach, which is denied, it was by the protector and the second defendant contended that it was not a party or privy to the breach. The plaintiff had not brought the protector as a party and this, contends the second defendant, is fatal to the plaintiff's case. Learned counsel relied on *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417.

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- A [17] It was also the argument of the second defendant that since the granting of a declaratory judgment is a matter of the discretion of the court, the court is entitled to take into consideration the motives of the plaintiff in bringing this action or undue delay.
- B [18] The plaintiff had not alleged that the first defendant had committed fraud on the beneficiaries. The complaint of breach of trust arises from the fact that the first defendant had not given the option to the beneficiaries as per the terms that was offered to the protector. Clause 6 of the trust deed provides that the trustee shall not be liable for any breach of trust howsoever occurring except to the extent (if any) that such breach results from its own willful default or willful neglect. From the contemporaneous documents, it is my view that the first defendant had made attempts to obtain the best possible deal for the trust property. Advertisements were placed in the newspapers (exh A3 encl 4a). Various meetings were held with the protectors and offers were also made to the beneficiaries vide letters dated 23 January 2006 (exh A12 encl 4a; exh A8 encl 4a) to lease the trust property for RM50,000 per month. None of the beneficiaries responded. I am minded of the fact that the plaintiff denied ever receiving this letter. However prior to the letter dated 23 January 2006, several advertisements were placed in the newspapers. Therefore all along the plaintiff knew of the fact that the trust property was up for lease and if the plaintiff had been serious in taking the offer or in making a counter offer, it could have done so by giving its response to the first defendant, but it did not. I accept the averments of the first defendant that there is an urgent need to lease out the property as the tenancy agreements had expired and the trust funds were insufficient to refurbish the trust property.
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- G [19] I also accept that the first defendant had not obtained the valuation report prior to leasing out the trust property to the second defendant. However, the absence of a valuation report in my view is not fatal and does not in itself show willful default or willful neglect of the first defendant. This is because the lease to the second defendant for the sum of RM42,000 per month for the first five years and RM50,000 per month for the remaining five years was after several advertisements for a higher rate failed to attract any takers. Given the fact, the decision to lease out the trust property to the second defendant for the above mentioned rate after consultation with the protectors is reasonable in the circumstances. This is consistent with cl 13 which provides that the trustee may consult the protectors with regard to the management of the assets and the trustee shall be guided by the majority decision of the protectors.
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[20] In the case of *Tan Hock Khoon v Phua Siew Lang (P) & Ors* [2006] 6 MLJ 645 cited by learned counsel for the first defendant, Gopal Sri Ram JCA said at p 647:

Although at the hearing before the judge, the sixth, ninth, tenth, 12th and 13th defendants produced a valuation report showing the land to be RM1.9m, there was no evidence of a genuine buyer produced at the hearing of the summons or any earlier. There is, mention made by the learned judge in his judgment of a statement by counsel for the remaining defendants that the 15th defendant was agreeable to purchase the subject land for RM1.3m. But it is significant that no evidence of means was put in to show a real ability on his part to produce the purchase price. Against all this, the judge had before him a purchaser who was ready, willing and able to complete the purchase at RM1m without vacant possession. If the sale is not put through there is no saying how many more years this estate will remain without being wound up. There is therefore merit in the complaint of learned counsel that the learned judge failed to take into account relevant considerations when exercising his discretion against the plaintiff.

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[21] Learned counsel for the plaintiff had referred to cl 11(g) of the trust deed which provides:

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Any act, deed or notice given to the Trustee by the Protector shall be evidenced in writing or by deed executed by the Protector under his hand or if there be more than one, by all of them.

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[22] In this regard the complaint raised by the plaintiff is that the protectors had not given written notice to the first defendant of their interest to lease the trust property. In the light of the protectors meetings and the decisions that were taken therein I hold that the absence of the written notice does not invalidate the decision to lease out the trust property to the second defendant. In totality I am of the view that the first defendant had acted reasonably and was not in breach of trust in leasing out the trust property to the second defendant. I do not see the need to discuss the issues raised in respect of s 340 of the National Land Code and the mode adopted by the plaintiff in bringing this action. The originating summons is accordingly dismissed with costs.

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Originating summons dismissed with costs.

Reported by Kanesh Sundrum

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